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No. 98-1459

In The

Supreme Court of the United States

October Term, 1998

GAVIN GUTRIDGE,

Petitioner,

vs.

MIDLAND COMPUTER, INC., d/b/a COMPUTERLAND OF NEBRASKA, a/k/a COMPUTERLAND; and WAYNE CLURE as President of ComputerLand, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JEFF C. MILLER
Counsel of Record
DUNCAN A. YOUNG
YOUNG & WHITE
8742 Frederick Street
P.O. Box 241358
Omaha, NE 68124-5358
(402) 393-5600
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 1

1. Statement Of The Facts 2

2. The Petition Misrepresents The Decision Of The United States District Court For The District Of Nebraska 8

3. The Petition Misrepresents The Decision Of The United States Court Of Appeals For The Eighth Circuit 9

REASONS FOR DENYING THE WRIT 10

1. The Decisions Below Resolved All Arguments Against Mr. Gutridge 10

2. The Decisions Below Properly Interpreted And Applied The Americans With Disabilities Act ... 10

3. There Are No Conflicting Decisions 22

4. The Decisions Below Are Supported On Other Grounds 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Aldrich v. Boeing Co., 146 F.3d 1265 (10th Cir. 1998) 22, 24, 25

Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311 (8th Cir. 1996) 15

Burch v. Coca-Cola Co., 119 F.3d 305 (5th Cir. 1997) 23

Colwell v. Suffolk County Police Dep't, 158 F.3d 635 (2d Cir. 1998) 20, 23

Demming v. Housing and Redevelopment Auth. of Duluth, 66 F.3d 950 (8th Cir. 1995) 23

Gerdes v. Swift-Eckrich, Inc., 125 F.3d 634 (8th Cir. 1997) 16

Halperin v. Abacus Technology Corp., 128 F.3d 191 (4th Cir. 1997) 16, 20

Heintzelman v. Runyon, 120 F.3d 143 (8th Cir. 1997) 20

Helfter v. United Parcel Serv., Inc., 115 F.3d 613 (8th Cir. 1997) 15

Land v Baptist Medical Ctr., 164 F.3d 423 (8th Cir. 1999) 20

Lenhardt v. Basic Inst. of Technology, Inc., 55 F.3d 377 (8th Cir. 1995) 29

Mason v. Stallings, 82 F.3d 1007 (11th Cir. 1996) 29

McCollough v. Atlanta Beverage Co., 929 F. Supp. 1489 (N.D. Ga. 1996) 28

McDonald v. Commonwealth of Pennsylvania, 62 F.3d 92 (3d Cir. 1995) 20

TABLE OF AUTHORITIES – Continued

Page

Robinson v. Global Marine Drilling Co., 101 F.3d 35 (5th Cir. 1996) 20

Sanders v. Arneson Prod., Inc., 91 F.3d 1351 (9th Cir. 1996) 20

School Bd. of Nassau County v. Arline, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987) 22, 23, 24

Sherrod v. American Airlines, Inc., 132 F.3d 1112 (5th Cir. 1998) 14, 15, 20

Snow v. Ridgeview Medical Ctr., 128 F.3d 1201 (8th Cir. 1997) 14

Taylor v. U.S. Postal Serv., 946 F.2d 1214 (6th Cir. 1991) 22, 23, 24

Terrell v. USAir, Inc., 955 F. Supp. 1448 (M.D. Fla. 1996) 28

U.S. E.E.O.C. v. AIC Security Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1993) 29

Vaughan v. Harvard Indus., Inc., 926 F. Supp. 1340 (W.D. Tenn. 1996) 28

Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346 (4th Cir. 1996) 15, 16

Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995) 16

STATUTES:

29 U.S.C. § 706 22

42 U.S.C. § 12102 ..... 11, 13, 15, 17, 20

42 U.S.C. § 12111 ..... 26, 29

42 U.S.C. § 12112 17

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

29 C.F.R. § 1630.2 ..... 1, 11, 12, 20

29 C.F.R. Pt. 1630, Appendix to Part 1630 – Interpretive Guidance to Title I of the ADA 18, 20

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes set forth in the Petition For Writ Of Certiorari, it is respectfully submitted that the following statutes and regulations are involved in this case:

29 C.F.R. § 1630.2(j)(2)

> The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
>
> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(k)

> Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

STATEMENT OF THE CASE

The Respondents respectfully submit that the published opinion of the United States Court of Appeals for the Eighth Circuit accurately describes the course of proceedings below. Because the Petitioner's discussion of the facts fails to fully set forth the facts material to the consideration of the questions presented, the Respondents will provide such a thorough recitation of the facts.

1. Statement Of The Facts.

Midland Computer, Inc. is a Nebraska corporation which does business as ComputerLand of Nebraska and which is also known as ComputerLand. Since 1992, the business operations of ComputerLand have consisted of the selling of personal computers and related products and the providing of maintenance and support services therefor, directly to businesses. Prior to 1992, the business operations of ComputerLand consisted of retail sales of personal computers to home users and small businesses, but such retail operations were transitioned out by 1992 and ComputerLand no longer engages in such retail operations.

The computer equipment which ComputerLand sells directly to businesses consists of computers and all accessories such as monitors, servers, keyboards, printers, scanners, and battery backup systems. These various components to a complete computer system are of various sizes and weights. For example, servers weigh fifty pounds, monitors or displays weigh from thirty-one pounds up to eighty-six pounds, printers weigh forty-six pounds and more, and battery backup systems weigh from fifty pounds to more than one-hundred pounds. Seventeen inch monitors are the standard size monitor for ComputerLand's customers, and these seventeen inch monitors weigh between forty-eight and fifty-nine pounds. Some of these computer components have an "on-site 3-year warranty" and some have a "3-year; on-site 1st year" warranty.

Between 1990 and 1995, ComputerLand employed approximately ten to thirteen full-time and part-time service technicians. The duties of these service technicians were to install, repair, and service all of the computer

equipment sold to ComputerLand's customers. In performing these duties the service technicians were required to lift computer equipment, transport computer equipment between the customer site and ComputerLand's shop, and move objects at the customer site such as desks, shelves, and chairs. Mr. Gutridge agrees that ComputerLand's service technicians were required to lift computer equipment, that the lifting of computer equipment in excess of forty-five and fifty pounds was required, that the lifting of heavy equipment was required, that the lifting of equipment weighing fifty to seventy-five pounds was something that ComputerLand expected service technicians to do, and that the moving of equipment which weighed as much as one-hundred pounds while working alone at a customer site was also required.

In order to provide services to its customers, ComputerLand's service technicians are dispatched to the customer's site and ComputerLand's service technicians are all thus "outbound" service technicians. Each service technician functions independently of the other service technicians and they do not work as a team. All service work is to be performed at the customer's site if at all feasible, and service work is to be performed at ComputerLand's shop only when it cannot feasibly be accomplished at the customer's site. The performance of all service work at the customer's site is either pursuant to the "on-site" service warranties or for increased customer convenience.

ComputerLand does not have any "inbound" or "in-shop" service technician positions where the service technician just works on computer equipment at ComputerLand's shop. In the 1980s and into the early 1990s, the

majority of service work was performed in ComputerLand's shop, but this was when ComputerLand's business operations consisted of retail sales to home users and small businesses. Such retail operations were transitioned out by 1992 and ComputerLand no longer runs such retail operations or such in-shop service work. The percentage of ComputerLand's business which consists of a customer bringing in computer equipment for service work is very, very small and is less than one-quarter of one percent.

In the fall of 1990 ComputerLand hired Mr. Gutridge as an outbound service technician. While so employed and on March 16, 1993, Mr. Gutridge was lifting a fifty-five pound monitor when he heard his left wrist snap. Thereafter and through June 1995, Mr. Gutridge received medical treatment for left and right carpal tunnel syndrome and left and right cubital tunnel syndrome. Such medical treatment included five separate surgeries on Mr. Gutridge's left and right wrists and elbows, and it was the opinion of two physicians that Mr. Gutridge's injury and conditions were all due to occupational activity at ComputerLand and were thus covered under workers' compensation.

More specifically and with regard to Mr. Gutridge's conditions, his right carpal tunnel syndrome was diagnosed to be mild, his left carpal tunnel syndrome was diagnosed to be borderline, and his right cubital tunnel syndrome was also diagnosed to be mild. Furthermore, neurological and electromyographic examinations were normal and revealed no evidence of acute or chronic denervation, no evidence of a generalized neuropathic process, and no evidence of an ongoing neurologic injury.

Between March 1993 and June 1995, ComputerLand assigned Mr. Gutridge to light duty work as an in-shop service technician because of lifting restrictions placed on him by his treating physician. This assignment was temporary and Mr. Gutridge acknowledges such, and no other ComputerLand service technician other than Mr. Gutridge was assigned as an in-shop service technician. Mr. Gutridge's lifting restrictions varied during this time based on where he was with his medical treatment, and Mr. Gutridge worked as an in-shop service technician by using the assistance of other personnel when lifting. ComputerLand was cooperative and supportive regarding Mr. Gutridge's temporary restrictions.

On June 19, 1995, Mr. Gutridge had reached maximum medical improvement and his treating physician issued a written release for Mr. Gutridge to return to light duty work with this permanent restriction: "May lift 45 lb 5% of work day, 35 lb 33% of time 20 lb 20% of time, 10 lb constantly (permanent)." Mr. Gutridge gave this written release to ComputerLand's personnel director, Robert Keefe, and Mr. Keefe advised Mr. Gutridge not to exceed any of his permanent lifting restrictions.

Mr. Keefe delivered the written release to ComputerLand's president, Wayne Clure, and the two of them then discussed Mr. Gutridge's future employment. More specifically, Mr. Keefe and Mr. Clure discussed the duties of ComputerLand's service technicians, whether Mr. Gutridge could perform the duties of a service technician with his permanent lifting restriction, the reasonable accommodations that could be made, the other positions available, and the nature of ComputerLand's business. Based on Mr. Gutridge's permanent lifting restriction, it was decided that Mr. Gutridge was not able to perform

the duties of a ComputerLand service technician, that there were no other positions available for Mr. Gutridge, that there were no reasonable accommodations that could be made, and that Mr. Gutridge's employment with ComputerLand would be terminated.

On June 22, 1995, ComputerLand gave Mr. Gutridge a letter of termination. The body of this termination letter states:

> We have been hopeful for some time now that your physical problems were temporary and that through rehabilitation you would be able to resume your job without the assistance of another employee to handle the lifting requirements.
>
> We have been informed that your rehabilitation program has ended and that the medical restrictions as identified by Dr. David Clough are now rated as permanent. That condition unfortunately prevents you from being able to fully accomplish the tasks necessary to perform your job functions.
>
> We regret to inform you that we will no longer retain your services under these conditions. Your employment is being terminated effective June 23, 1995. We have been told that you will be eligible for retraining under workman's compensation and hope that you will take advantage of this opportunity.
>
> You have been a valued employee and we sincerely regret that we do not have a position available that can utilize your skills without creating a hardship for the company.
>
> Thank you for the efforts you have given this company over the past four and a half years. We wish you the best.

Mr. Clure and Mr. Keefe did not believe that Mr. Gutridge was disabled and did not perceive Mr. Gutridge to be disabled, and Mr. Gutridge was not terminated because of a disability or any perceived disability. Mr. Gutridge does not know of any information or evidence which would support an allegation that ComputerLand was trying to get rid of him for any reasons other than what is stated in the termination letter.

Mr. Gutridge's abilities as a computer service technician are above average and his permanent lifting restriction does not limit his ability to perform the job of a service technician for other employers which do not require on-site customer service. In fact on July 17, 1995, which is just three and a half weeks after his termination from ComputerLand, Mr. Gutridge was employed as a computer service technician by another company in Omaha. This other company was a vendor of on-site and in-shop computer repairs, and Mr. Gutridge was so employed by this other company through May 1997. During such employment Mr. Gutridge was promoted to lead service technician and his annual salary was $27,500.00.

This other employer closed its commercial division in May 1997 and Mr. Gutridge then started employment as a computer service technician for yet another company in Omaha. The period of unemployment between these two companies was just two weeks, and Mr. Gutridge never applied for employment any place else because he had been guaranteed employment with the second company. The business operations of the second company consist of retail in-shop and on-site computer repairs. Mr. Gutridge's annual salary at this second company is $26,000.00, and Mr. Gutridge is able to perform all functions of this job.

As agreed to in the Application For Approval Of Lump Sum Settlement Agreement which was filed with the Nebraska Workers' Compensation Court in October 1995, after his termination from ComputerLand Mr. Gutridge returned to other employment on July 17, 1995 and he "possesses sufficient present job skills to enable him to obtain and retain employment at a wage equal to or in excess of his wage with [ComputerLand]. . . . " Furthermore, in the Application For Approval Of Lump Sum Settlement Agreement, Mr. Gutridge waived any rights he may have had to rehabilitation services pursuant to the Nebraska Workers' Compensation laws.

2. The Petition Misrepresents The Decision Of The United States District Court For The District Of Nebraska.

As was alleged in Mr. Gutridge's Amended Complaint, it was the permanent lifting restriction which supposedly constituted a disability under 42 U.S.C. § 12102(2). Likewise, Mr. Gutridge twice testified in his deposition that his disability was the permanent lifting restriction, and Mr. Gutridge further testified that he did not know of any information or evidence which would support an allegation that ComputerLand was trying to get rid of him for any reasons other than what was stated in ComputerLand's termination letter.

The crux of the arguments that were presented to the District Court therefore addressed whether there were genuine issues of material fact as to whether Mr. Gutridge's lifting restriction constituted a physical impairment which substantially limited major life activities. Mr.

Gutridge did make a secondary argument that his temporary course of treatment and period of recovery constituted a record of such an impairment, but the District Court's written decision properly focused on the crux of the parties' arguments, and by deciding that Mr. Gutridge was not a disabled individual the District Court resolved Mr. Gutridge's record of impairment argument against him. Similarly, by deciding that Mr. Gutridge was not a disabled individual, the District Court resolved that all major life activities, including the performance of manual tasks, were not substantially limited. The assertions that the District Court did not address and therefore left unresolved, the issues of a record of impairment and whether Mr. Gutridge was substantially limited in the performance of manual tasks, thus misrepresent the District Court's decision.

3. The Petition Misrepresents The Decision Of The United States Court Of Appeals For The Eighth Circuit.

On appeal Mr. Gutridge's arguments focused on whether he had a record of impairment concerning the major life activities of working, lifting, and performing manual tasks. The Eighth Circuit ruled, however, that Mr. Gutridge failed to present a genuine issue of fact that one or more of his major life activities were substantially limited, and the Eighth Circuit also ruled that Mr. Gutridge failed to present a genuine issue of fact that he is disabled within the meaning of the ADA. In so ruling the Eighth Circuit resolved all of Mr. Gutridge's arguments against him. Mr. Gutridge's assertions that the Eighth Circuit overlooked whether the major life activity of performing manual tasks was substantially limited, and that

the Eighth Circuit failed to consider his impairment's cumulative effect on all major life activities, are misrepresentations of the Eighth Circuit's decision.

REASONS FOR DENYING THE WRIT

1. The Decisions Below Resolved All Arguments Against Mr. Gutridge.

Mr. Gutridge's Petition makes several assertions that the courts below either overlooked or failed to address or consider some of his arguments. As previously discussed, however, by deciding that there were no genuine issues of fact that Mr. Gutridge was not disabled under the ADA, the courts below resolved all of Mr. Gutridge's arguments against him. Mr. Gutridge's assertions about overlooked arguments are misrepresentations, and such assertions are therefore insufficient grounds for granting certiorari.

2. The Decisions Below Properly Interpreted And Applied The Americans With Disabilities Act.

The thrust of Mr. Gutridge's Petition is simply that the decisions of the courts below are erroneous. What the courts below determined, was that there was an absence of evidence establishing a *prima facie* case on the essential element of being disabled under the ADA, and it is respectfully submitted that in so acting the courts below properly ruled and properly interpreted and applied the ADA. Mr. Gutridge therefore fails to present any compelling reasons for granting a writ of certiorari.

With regard to what constitutes a disability, the ADA provides that "[t]he term 'disability' means, with respect to an individual – (A) a physical or mental impairment

that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §§ 12102(2)(A)-(C). The key terms in this definition of disability, are in turn defined in regulations issued by the Equal Employment Opportunity Commission. As applicable here, "physical impairment" is defined in part as any physiological disorder or condition affecting the neurological or musculoskeletal systems. 29 C.F.R. § 1630.2(h)(1). "Substantially limits" is defined as meaning:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. §§ 1630.2(j)(1)(i) and (ii). The term "major life activities" is defined to mean "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). The E.E.O.C.'s Interpretive Guidance to the regulations further provides that "other major life activities include, but are not limited to, sitting, standing, lifting, reaching." 29 C.F.R. Pt. 1630, Appendix to Part 1630 – Interpretive Guidance to Title I of the ADA, § 1630.2(i). And the term "has a record of such an impairment" is defined as meaning "has a history of, or has

been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k).

When determining whether an individual is substantially limited in a major life activity, the regulations further provide that there be consideration of the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. §§ 1630.2(j)(2)(i)-(iii).

Finally, as to whether the major life activity of working is substantially limited, the regulations provide:

> (3) With respect to the major life activity of *working* –
>
> (i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
>
> (ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":
>
> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills

> or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. §§ 1630.2(j)(3)(i)(ii)(A)-(C).

ACTUAL DISABILITY

The crux of the arguments presented to the District Court concerned whether there were genuine issues of material fact as to whether Mr. Gutridge had an actual disability under 42 U.S.C. § 12102(2)(A), which is there defined as a physical impairment that substantially limits major life activities. The District Court decided that Mr. Gutridge had failed to bring forth sufficient facts to raise a genuine issue, and that Mr. Gutridge was thus not disabled within the meaning of 42 U.S.C. § 12102(2)(A) because Mr. Gutridge's lifting restriction did not substantially limit his major life activities. It is respectfully submitted that summary judgment was properly granted and affirmed because of the absence of evidence establishing a *prima facie* case on this element of Mr. Gutridge's ADA claim, and that the courts below thus properly interpreted and applied the ADA.

First, as alleged in Mr. Gutridge's Complaint, and as Mr. Gutridge himself testified, his disability is the written lifting restriction which was issued by his physician in

June 1995. This lifting restriction provides that Mr. Gutridge may lift 45 lbs. 5% of the work day, 35 lbs. 33% of the time, 20 lbs. 20% of the time, and 10 lbs. constantly. But as the circuit courts have held, such a written lifting restriction is not an impairment which substantially limits major life activities and is not therefore a disability under the ADA, and an employer's actions based on a physician's written restrictions do not violate the ADA.

For example, in *Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201 (8th Cir. 1997), the plaintiff underwent a cervical fusion and some years later the plaintiff's physician recommended a twenty-five pound lifting restriction. *Id.* at 1204. Years later the plaintiff was terminated and she asserted that her physical impairment " 'affects such activities as performing manual tasks, . . . lifting, and working." *Id.* at 1207. In affirming summary judgment for the defendant-employer it was held: "While lifting is noted under the regulations as a major life activity, a general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA." *Id.*

A flight attendant was the plaintiff in *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1116 (5th Cir. 1998), and after an on-the-job neck injury which required surgery, the plaintiff reinjured her neck while working and had surgery again. *Id.* Following the second surgery the plaintiff was placed on sick leave for a five year term pursuant to the collective bargaining agreement. *Id.* After three years the plaintiff sought reinstatement, but reinstatement was denied because the plaintiff could only lift forty-five pounds occasionally and twenty-five pounds frequently. *Id.* Summary judgment against the plaintiff's ADA claim was affirmed on the basis that the lifting

restriction was not a substantial limitation on a major life activity. *Id.* at 1120.

In *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613 (8th Cir. 1997), the plaintiff had a permanent medical restriction which included "a lift limit of ten pounds frequently and twenty pounds occasionally." *Id.* at 615. The plaintiff's disability discrimination claim was based on the Iowa Civil Rights Act and not the ADA, but in affirming summary judgment for the defendant-employer it was held that evidence that the impairment limits work-related activities such as lifting does not create a genuine issue regarding substantial limitations on other major life activities. *Id.* at 617.

The plaintiff in *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311 (8th Cir. 1996), was hospitalized for several days and later returned to work with a doctor's release prohibiting the lifting of more than twenty-five pounds. *Id.* at 1314. The circuit court affirmed summary judgment for the defendant-employer and held that the lifting restriction, without more, did not constitute an impairment that substantially limits major life activities under 42 U.S.C. § 12102(2)(A). *Aucutt*, 85 F.3d at 1319.

Summary judgment for the defendant-employer was likewise affirmed in *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346 (4th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1844, 137 L. Ed. 2d 1048 (1997). The plaintiff in that case had a restriction from lifting more than twenty-five pounds, and citing to the decision in *Aucutt* the Fourth Circuit held: "Like the Eighth Circuit, we hold, as a matter of law, that a twenty-five pound lifting limitation – particularly when compared to an

average person's abilities – does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity." *Williams*, 101 F.3d at 349.

The case of *Gerdes v. Swift-Eckrich, Inc.*, 125 F.3d 634 (8th Cir. 1997), involved a plaintiff who had undergone two heart surgeries and who had returned to work with medical restrictions, in part, against excessive lifting. *Id.* at 635. The defendant-employer based its conduct on the plaintiff's actual medical restrictions, *id.* at 637, and the circuit court affirmed the granting of summary judgment for the employer because the plaintiff failed to show that he was disabled as defined by the ADA. *Id.* at 637-38.

In *Halperin v. Abacus Technology Corp.*, 128 F.3d 191 (4th Cir. 1997), the plaintiff injured his back at work, but he returned to work for several months and then he took an extended leave for recuperation. *Id.* at 195. After a couple of months the plaintiff was cleared by his doctor to return to work with a twenty pound lifting restriction. *Id.* Summary judgment for the employer was affirmed because the plaintiff did not have a significant restriction on the ability to perform any major life activity. *Id.* at 200.

A diagnosis of bilateral carpal tunnel syndrome and a doctor's twenty pound lifting restriction were involved in *Wooten v. Farmland Foods*, 58 F.3d 382, 384 (8th Cir. 1995). Like the case at bar the termination decision of the defendant-employer in *Wooten* was based on the physical restrictions imposed by the doctor and the unavailability of other jobs which could accommodate the restrictions. *Id.* at 386. The circuit court concluded that there was no material dispute as to whether the plaintiff was disabled within the meaning of the ADA and summary judgment for the defendant-employer was thus affirmed. *Id.*

The foregoing authorities establish that Mr. Gutridge's written lifting restriction is not, without more, an impairment which substantially limits any major life activities and is thus not an actual disability within the meaning of 42 U.S.C. § 12102(2)(A), and that Computer-Land's termination of Mr. Gutridge's employment based on the lifting restriction and Mr. Gutridge's inability to perform the essential job functions, plus the unavailability of other positions which could accommodate the restriction, does not violate the ADA. The courts below thus properly interpreted and applied the ADA, and summary judgment was therefore properly granted and affirmed because of the absence of evidence establishing a *prima facie* case on this element of Mr. Gutridge's ADA claim.

RECORD OF IMPAIRMENT

The almost exclusive focus of Mr. Gutridge's arguments on appeal, was whether he has a record of an impairment as provided in 42 U.S.C. § 12102(B). Based on his course of treatment and the attendant medical records, Mr. Gutridge asserts that he is entitled to summary judgment on the essential element of being a disabled individual within the meaning of the ADA because he allegedly has such a record of an impairment. A number of fatal defects exist, however, with Mr. Gutridge's assertion.

First, even assuming arguendo that Mr. Gutridge's course of treatment and the attendant medical records constitute a record of an impairment, there is an absence of evidence to show that Mr. Gutridge was terminated because of any such record of impairment. The ADA prohibits the discriminatory discharge of a qualified

employee with a disability "because of" the disability. 42 U.S.C. § 12112(a). Stated in a different vernacular and with regard to having a record of an impairment, the ADA prohibits an employer from discriminatorily discharging a qualified employee with a record of an impairment "because of" that employee's record of an impairment. As further explained in the E.E.O.C.'s Interpretive Guidance, the intent of the record of impairment provision is to ensure that employees are not discriminated against "because of" a history of a disability and that employees are not discriminated against "because" they have been misclassified as disabled, and this provision "is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment." 29 C.F.R. Pt. 1630, Appendix to Part 1630 – Interpretive Guidance to Title I of the ADA, § 1630.2(k).

Here, however, there is an absence of evidence that ComputerLand terminated Mr. Gutridge "because of" his course of treatment or "because of" the attendant medical records. Additionally, there is an absence of evidence that ComputerLand "relied on" the course of treatment or the attendant medical records when deciding to terminate Mr. Gutridge. Instead, the unrefuted evidence is that the individuals at ComputerLand did not believe or perceive Mr. Gutridge to be disabled, that Mr. Gutridge was not terminated because of a disability or any perceived disability, that Mr. Gutridge's lifting restriction was not believed to limit his ability to perform the job of a service technician for other companies which do not require on-site customer service, and that Mr. Gutridge's employment was terminated in June 1995 because he was not

then able to perform the duties of a ComputerLand service technician under his recently imposed permanent lifting restriction and also because ComputerLand did not have a service technician position which could accommodate Mr. Gutridge's restrictions. Mr. Gutridge himself twice testified that his disability was the permanent lifting restriction, and Mr. Gutridge further testified that he does not know of any information or evidence which would support an allegation that ComputerLand was trying to get rid of him for any reasons other than what is stated in ComputerLand's termination letter. No evidence therefore exists that "because of" Mr. Gutridge's past course of treatment and the attendant medical records, ComputerLand decided to terminate his employment.

Mr. Gutridge in fact fully acknowledges that he was not terminated because of any supposed record of impairment, for in both his Complaint and his Petition herein it is stated that ComputerLand terminated his employment "based upon his permanent lifting restriction." (Petition For Writ Of Certiorari at 3.) This is thus not a neatly tailored case wherein this Court could render a narrow and focused decision on the ADA's "record of impairment" provision. On the contrary, it is respectfully submitted that the Question Presented For Review would not be reached if a writ of certiorari was granted, because there is no genuine issue of material fact that Mr. Gutridge was not terminated because of any record of an impairment and the Eighth Circuit's decision would have to be affirmed on this basis.

Second, the record of an impairment which is required by the ADA is a history of or a misclassification as having an impairment which substantially limits a

major life activity. 42 U.S.C. §§ 12102(2)(A) and (B); 29 C.F.R. § 1630.2(k). In other words, it must be a record of a disability that satisfies the ADA. *Land v. Baptist Medical Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 645 (2d Cir. 1998); *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1820, 137 L. Ed. 2d 1028 (1997). Temporary medical conditions, however, are not a disability, *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 199 (4th Cir. 1997), and temporary impairments with no long-term or permanent impact are also usually not a disability. 29 C.F.R. Pt. 1630, Appendix to Part 1630 – Interpretive Guidance to Title I of the ADA, § 1630.2(j). Likewise, temporary impairments while recovering and recuperating from an injury or surgery are not disabilities under the ADA. *Sanders v. Arneson Prod., Inc.*, 91 F.3d 1351, 1353-54 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1247, 137 L. Ed. 2d 392 (1997); *Heintzelman v. Runyon*, 120 F.3d 143, 145 (8th Cir. 1997); *McDonald v. Commonwealth of Pennsylvania*, 62 F.3d 92, 95-96 (3d Cir. 1995). Thus, the events concerning temporary medical conditions and temporary impairments while recovering and recuperating from an injury or surgery do not constitute a record or history of a disability, and if the alleged impairment is not a disability, then there necessarily is likewise no record or history of a disability. *Land*, 164 F.3d at 425; *Colwell*, 158 F.3d at 645; *Sherrod*, 132 F.3d at 1121; *Robinson*, 101 F.3d at 37.

Here, Mr. Gutridge is not disabled under the ADA because his permanent lifting restriction is not an impairment which substantially limits any major life activities, and therefore the temporary course of treatment and the

period of recovery which preceded the resulting permanent lifting restriction are likewise not a record of an impairment that substantially limits major life activities. Mr. Gutridge does not have a history of a permanent lifting restriction which substantially limits major life activities, and there is also no evidence of any record wherein Mr. Gutridge was misclassified as having a permanent lifting restriction which substantially limits major life activities. Mr. Gutridge continued to work for ComputerLand during his temporary course of treatment and period of recovery, although it was in a temporary light duty position as an in-shop service technician and pursuant to temporary lifting restrictions, and there is no evidence that any other major life activities were substantially limited during Mr. Gutridge's temporary course of treatment and period of recovery. A temporary course of treatment and period of recovery which do not result in an impairment which substantially limits major life activities and during which temporary period the employee continues employment and is not otherwise substantially limited in performing any other major life activities, do not as a matter of law constitute a record of impairment which substantially limits major life activities. The Eighth Circuit's decision correctly resolved Mr. Gutridge's record of an impairment argument against him and in so doing the Eighth Circuit properly interpreted and applied the ADA and the foregoing authorities. Mr. Gutridge thus incorrectly asserts that the decisions of the courts below are erroneous, and no grounds therefore exist for granting certiorari on such supposed basis.

3. There Are No Conflicting Decisions.

Mr. Gutridge asserts that the decisions of the courts below conflict with the decisions in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987), *Aldrich v. Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998), and *Taylor v. U.S. Postal Serv.*, 946 F.2d 1214 (6th Cir. 1991). It is respectfully submitted, however, that no such conflict exists, and that no grounds therefore exist for granting certiorari on such supposed basis.

The plaintiff in *Arline* was an elementary school teacher who was hospitalized for tuberculosis in 1957. *Arline* at 276, 107 S. Ct. at 1125, 94 L. Ed. 2d at 314. The disease was in remission for the next twenty years, but in 1978 the plaintiff had two relapses and the school board thereafter terminated the plaintiff's employment because of the continued reoccurrences. *Id.* The plaintiff sued pursuant to the Rehabilitation Act, and the school board conceded that the plaintiff's hospitalization for tuberculosis in 1957 demonstrated that the plaintiff had a record of a physical impairment. *Id.* at 281, 107 S. Ct. at 1128, 94 L. Ed. 2d at 317. This Court held that the tuberculosis

> was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus, Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a "record of . . . impairment" within the meaning of 29 U.S.C. § 706(7)(B)(ii), and is therefore a handicapped individual.

Arline at 281, 107 S. Ct. at 1127, 94 L. Ed. 2d at 317. No factual details about the hospitalization are provided however.

Based on such language, plaintiffs have been asserting that *Arline* establishes that their hospitalizations constitute records of substantially limiting impairments, but the circuit courts have consistently and properly rejected such a reading of *Arline*. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 645-46 (2d Cir. 1998); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316-17 (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 871, 139 L. Ed. 2d 768 (1998); *Demming v. Housing and Redevelopment Auth. of Duluth*, 66 F.3d 950, 955 (8th Cir. 1995); and *Taylor v. U.S. Postal Serv.*, 946 F.2d 1214, 1217 (6th Cir. 1991). The reasoning of the circuit courts for so rejecting such a reading of *Arline*, is best set forth in *Burch*, 119 F.3d at 317:

> The quoted language from *Arline* cannot be construed to obviate the requirement, explicit in the ADA and its implementing regulations, that purported conditions be examined to ascertain whether a specific condition substantially limited a major life activity. The ADA requires an individualized inquiry beyond the mere existence of a hospital stay. Although the Court in *Arline* noted that the plaintiff's hospitalization established a *record* of impairment, the defendant had conceded that her acute tuberculosis had been substantially limiting. Indeed, the defendant's position in *Arline* was not that the plaintiff was not "handicapped," but rather that her contagious disease – tuberculosis – was a threat to the health of others (and therefore precluded liability for termination on that basis). To

> accept Burch's reading would work a presumption that any condition requiring temporary hospitalization is disabling – a presumption that runs counter to the very goal of the ADA.

The Eighth Circuit's decision herein is consistent with the foregoing reasoning and is consistent with the other circuit courts' proper interpretations of *Arline*. The Eighth Circuit's decision herein therefore does not conflict with the decisions in *Arline* or *Taylor*, and Mr. Gutridge's assertion to the contrary is erroneous and is erroneously based on his own misinterpretation of *Arline*.

The Eighth Circuit's decision also does not conflict with the decision in *Aldrich v. Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998). The plaintiff in *Aldrich* was an assembly worker who developed pain in his right hand and difficulty using hand tools. *Id.* at 1267. He could not return to work and he was put on a medical leave of absence. *Id.* He was later released to return to limited work but there was no work that he could do within his medical restrictions, so he continued on medical leave. *Id.* The medical evaluations thereafter became less optimistic, and his condition later became permanent, severe, and substantially limiting. *Id.* at 1270. A decision to lay off the plaintiff was made a week before a permanent partial disability rating was issued. *Id.* at 1267. The circuit court held that it was error to rule that the plaintiff as a matter of law could not be disabled until his permanent disability rating was issued. *Id.* at 1271.

Here, as alleged in his Complaint and as Mr. Gutridge twice testified, it was the permanent lifting restriction and not the preceding temporary course of treatment and period of recovery, which supposedly constituted his disability. Also, unlike in *Aldrich*, there is no evidence

here that during the temporary course of treatment and period of recovery, that Mr. Gutridge's impairment ever was severe or substantially limiting. Instead, Mr. Gutridge continued to work full time but pursuant to temporary restrictions, and the medical evaluations were that Mr. Gutridge's conditions were mild and borderline and that there was no evidence of acute or chronic denervation or of a generalized neuropathic process or of an ongoing neurologic injury. Mr. Gutridge's condition did not result in an impairment which substantially limits any major life activities and, unlike in *Aldrich*, Mr. Gutridge's temporary conditions during his course of treatment and period of recovery prior to the issuance of permanent lifting restrictions, also did not involve impairments which substantially limited any major life activities.

The Eighth Circuit's decision is respectfully submitted to not be contrary to the decision in *Aldrich*, and no grounds thus exist for granting certiorari on such supposed basis.

4. The Decisions Below Are Supported On Other Grounds.

Other grounds support the granting and affirmance of summary judgment, and based on these other grounds it is respectfully submitted that the Question Presented For Review would not be reached if a writ of certiorari was granted because affirmance would be required on the basis of these other grounds.

QUALIFIED INDIVIDUAL

The ADA only applies to a "qualified individual," which is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position. . . . " 42 U.S.C. § 12111(8). Assuming that Mr. Gutridge is an individual with a disability, it is respectfully asserted that summary judgment was properly granted and affirmed because there are no genuine issues that Mr. Gutridge could not perform the essential functions of a ComputerLand service technician either with or without reasonable accommodation.

First, as alleged in his Complaint and as Mr. Gutridge himself testified, his supposed disability is the permanent lifting restriction which is set forth in his written release to return to light duty work. This permanent lifting restriction limits Mr. Gutridge to lifting 45 lbs. 5% of the work day, 35 lbs. 33% of the time, 20 lbs. 20% of the time, and 10 lbs. constantly. As Mr. Gutridge further testified the reasonable accommodation which he thinks ComputerLand had to provide in order to allow him to continue working for ComputerLand, was to have other people momentarily assist him with lifting as needed.

Second, there are no disputes that lifting computer equipment and moving furniture which exceeds Mr. Gutridge's lifting restriction are essential functions of a ComputerLand service technician, and that Mr. Gutridge because of his lifting restriction could not perform such essential functions. Service technicians are routinely required to lift computer components and move objects such as desks and chairs which weigh in excess of forty-five pounds, and in order to perform the duties of a service technician for ComputerLand an individual has to

be able to lift weights in excess of forty-five pounds. A Job Summary which was prepared by ComputerLand in response to the request of Mr. Gutridge's physician, lists the ability to lift fifty to seventy-five pounds as an essential job function of a ComputerLand service technician, and the specification sheets for the computer components which are customarily sold, serviced, and installed by ComputerLand, show that nine of the ten computer components therein depicted exceed forty-five pounds. Even Mr. Gutridge himself testified that ComputerLand's service technicians were required to lift computer equipment, that the lifting of computer equipment in excess of forty-five and fifty pounds was required, that the lifting of heavy equipment was required, that the lifting of equipment weighing fifty to seventy-five pounds was something that ComputerLand expected service technicians to do, and that the moving of equipment which weighed as much as one-hundred pounds while working alone at a customer site was also required. If a person cannot lift or move items in excess of forty-five pounds, he or she obviously cannot perform the service and installation duties of a ComputerLand service technician. There is thus no genuine issues that lifting computer equipment and moving furniture in excess of forty-five pounds are essential job functions of a ComputerLand service technician and that Mr. Gutridge could not perform such essential functions.

Third, Mr. Gutridge's suggested accommodation of having other people assist him with lifting is not, as a matter of law, a reasonable accommodation required by the ADA. A reasonable accommodation must allow the disabled person himself to perform the job, and the ADA does not require an employer to accommodate a disabled

employee by having another employee assist the disabled employee in the performance of the disabled employee's duties. *McCollough v. Atlanta Beverage Co.*, 929 F. Supp. 1489, 1499 (N.D. Ga. 1996); *Vaughan v. Harvard Indus., Inc.*, 926 F. Supp. 1340, 1349 (W.D. Tenn. 1996). Also, ComputerLand's service operations consist of service technicians working independently with all service work to be performed at the customer's site in conjunction with "on-site" service warranties, and thus such a suggested accommodation would result in a fundamental and substantial change in ComputerLand's service technician operations because an assistant or another service technician would be required to accompany Mr. Gutridge while he performs all of his outbound service calls. The ADA does not require such an accommodation, and the ADA also does not require that ComputerLand create a permanent light duty position, or that ComputerLand create a new position such as an in-shop service technician, or that ComputerLand convert a temporary position into a permanent position. *Terrell v. USAir, Inc.*, 955 F. Supp. 1448, 1455 (M.D. Fla. 1996); *Vaughan*, 926 F. Supp. at 1348-49.

Thus, Mr. Gutridge is not a qualified individual under the ADA, and summary judgment was therefore properly granted and affirmed because of the absence of evidence establishing a *prima facie* case on this element of Mr. Gutridge's ADA claim.

WAYNE CLURE'S INDIVIDUAL LIABILITY

As alleged in Mr. Gutridge's Amended Complaint, ComputerLand is a Nebraska corporation and at all times relevant herein Wayne Clure was employed as ComputerLand's president and was acting in the scope and course

of such employment. The Affidavit of Mr. Clure supports such allegations and it further establishes that Mr. Gutridge was an employee of ComputerLand and that at no time did Mr. Clure ever personally hire or employ Mr. Gutridge. There is thus no factual dispute that ComputerLand and not Mr. Clure, was Mr. Gutridge's employer.

There is also no dispute that the ADA provides for employer liability and not individual employee liability. *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996); *U.S. E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1279 (7th Cir. 1993). The definition of employer under the ADA is "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person. . . . " 42 U.S.C. § 12111(5)(A). The Seventh and Eleventh Circuits have held that the term "agent" was included in the definition for purposes of ensuring *respondeat superior* liability and not to render decision-making employees vulnerable to individual liability. *Mason*, 82 F.3d at 1009; *AIC Security*, 55 F.3d at 1281. The Eleventh Circuit made this very clear when it held: "The plaintiff argued for individual liability because the definition of employer includes 'any agent of such person.' We agree with the Seventh Circuit that the 'agent' language was included to ensure *respondeat superior* liability of the employer for the acts of its agents. . . . " *Mason*, 82 F.3d at 1009. The definition of "employer" is thus to be construed the same as that term is construed under Title VII of the Civil Rights Act and the Age Discrimination In Employment Act, which preclude individual liability for persons other than employers. *Mason*, 82 F.3d at 1009. *See also Lenhardt v. Basic Inst. of Technology, Inc.*, 55 F.3d 377,

379-81 (8th Cir. 1995) (holding that the Missouri Human Rights Act, which defined employer similarly to Title VII of the Civil Rights Act and the Age Discrimination In Employment Act, did not allow for individual liability). Thus, as a matter of law, Wayne Clure has no individual liability and summary judgment was properly granted and affirmed on such basis.

CONCLUSION

For the reasons given herein, the Respondents respectfully request that the Petition For Writ Of Certiorari be denied.

Respectfully submitted,

MIDLAND COMPUTER, INC., d/b/a COMPUTERLAND OF NEBRASKA, a/k/a COMPUTERLAND; and WAYNE CLURE as President of ComputerLand, Individually, Respondents,

JEFF C. MILLER
Counsel of Record
DUNCAN A. YOUNG
YOUNG & WHITE
8742 Frederick Street
P.O. Box 241358
Omaha, NE 68124-5358
(402) 393-5600
Attorneys for Respondents